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15 BANK, FSB

16 UNITED STATES BANKRUPTCY COURT

17 DISTRICT OF NEVADA

18 In re  
19 JOSE AZMITIA,  
20 Debtor(s).

21 Bankruptcy Case No. BK-S-09-13716-mkn  
22 Chapter 7

23 WACHOVIA MORTGAGE, FSB, FKA  
24 WORLD SAVINGS BANK, FSB'S  
25 MOTION FOR RELIEF FROM  
26 AUTOMATIC STAY  
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

27 Date: May 18, 2009  
28 Time: 10:30 a.m.

19 Wachovia Mortgage, FSB, fka World Savings Bank, FSB ("Movant"), moves this court for  
20 an order terminating the automatic stay of 11 United States Code § 362 as to Movant, so that Movant  
21 may commence and continue all acts necessary to enforce its security interest in real property  
22 generally described as 5129 Cannon Boulevard, Las Vegas, Nevada 89108.

23 On or about March 17, 2009, Jose Azmitia ("Debtor") filed a voluntary petition under  
24 Chapter 7 of the Bankruptcy Code, and Yvette Weinstein was appointed as Chapter 7 Trustee. As a  
25 result of said filing, certain acts and proceedings against Debtor and the bankruptcy estate are stayed  
26 as provided in 11 United States Code § 362.

27 Movant moves this court for relief from stay under 11 United States Code §§ 362(d)(1) and  
28 362(d)(2).

## **MEMORANDUM OF POINTS AND AUTHORITIES**

I.

**MOVANT IS ENTITLED TO RELIEF FROM THE  
AUTOMATIC STAY UNDER 11 UNITED STATES CODE  
§ 362(d)(2).**

## **NO EQUITY**

11 United States Code § 362(d)(2) provides that relief from the automatic stay shall be granted if the debtor does not have any equity in the property and the property is not necessary to the debtor's effective reorganization.

In *In re San Clemente Estates*, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:

§ 362(d)(2) reflects congressional intent to allow creditors to immediately proceed against the property where the debtor has no equity and it is unnecessary to the reorganization, even where the debtor can provide adequate protection under § 362(d)(1). (Emphasis added).

Id. at 610 (emphasis added).

In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all encumbrances are totalled, whether or not all the lienholders have joined in the request for relief from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th Cir. 1984).

An appropriate cost of sale factor should also be added to determine if the debtor has any equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289 (Bankr. S.D. Cal. 1982).

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1 **THE FIRST NOTE AND DEED OF TRUST**

2 On or about May 18, 2005, Debtor, for valuable consideration, made, executed and delivered  
3 to Movant a First Note in the principal sum of \$147,200.00 (the "First Note"). Pursuant to the First  
4 Note, Debtor is obligated to make monthly principal and interest payments commencing July 15,  
5 2005, and continuing until June 15, 2035, when all outstanding amounts are due and payable. The  
6 First Note provides that, in the event of default, the holder of the First Note has the option of  
7 declaring all unpaid sums immediately due and payable. A true and correct copy of the First Note is  
8 attached hereto as exhibit B and incorporated herein by reference.

9 On or about May 18, 2005, the Debtor made, executed and delivered to Movant a First Deed  
10 of Trust (the "First Deed of Trust") granting Movant a security interest in real property commonly  
11 described as 5129 Cannon Boulevard, Las Vegas, Nevada 89108 (the "Real Property"), which is  
12 more fully described in the First Deed of Trust. The First Deed of Trust provides that attorneys' fees  
13 and costs incurred as a result of the Debtor's bankruptcy case may be included in the outstanding  
14 balance under the First Note. The First Deed of Trust was recorded on May 24, 2005, in the Official  
15 Records of Clark County, State of Nevada. A true and correct copy of the First Deed of Trust is  
16 attached hereto as exhibit C and incorporated herein by reference.

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1        The obligation under the First Note is in default as of December 15, 2008, for failure to make  
2 payments to Movant. As of April 9, 2009, the total obligation due and owing under the First Note is  
3 in the approximate amount of \$156,849.90, representing the principal balance of \$151,909.39,  
4 interest in the sum of \$4,271.30, late charges in the amount of \$175.96, escrow advances in the  
5 amount of \$428.25, and total fees in the amount of \$65.00. This is an approximate amount for  
6 purposes of this Motion only, and should not be relied upon as such to pay off the subject loan as  
7 interest and additional advances may come due subsequent to the filing of the Motion. An exact  
8 payoff amount can be obtained by contacting Movant's counsel. Further, Movant has incurred  
9 additional post-petition attorneys' fees and costs in bringing the instant Motion. Moreover, the total  
10 arrears under the First Note are in the approximate sum of \$5,130.61, excluding the post-petition  
11 attorneys' fees and costs incurred in filing the instant Motion. Movant's Information Sheet as to the  
12 extent of liens and encumbrances against the Real Property is attached hereto as exhibit A and  
13 incorporated herein by reference.

14 **THE SECOND NOTE AND DEED OF TRUST**

15        On or about September 16, 2006, Debtor, for valuable consideration, made, executed and  
16 delivered to Movant a Second Note in the principal sum of \$10,100.00 (the "Second Note").  
17 Pursuant to the Second Note, Debtor is obligated to make monthly principal and interest payments  
18 commencing November 15, 2006, and continuing until October 15, 2036, when all outstanding  
19 amounts are due and payable. The Second Note provides that, in the event of default, the holder of  
20 the Second Note has the option of declaring all unpaid sums immediately due and payable. A true  
21 and correct copy of the Second Note is attached hereto as exhibit D and incorporated herein by  
22 reference.

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1 On or about May 18, 2005, the Debtor made, executed and delivered to Movant a Second  
2 Deed of Trust (the "Second Deed of Trust") granting Movant a security interest in real property  
3 commonly described as 5129 Cannon Boulevard, Las Vegas, Nevada 89108 (the "Real Property"),  
4 which is more fully described in the Second Deed of Trust. The Second Deed of Trust provides that  
5 attorneys' fees and costs incurred as a result of the Debtor's bankruptcy case may be included in the  
6 outstanding balance under the Second Note. The Second Deed of Trust was recorded on September  
7 21, 2006, in the Official Records of Clark County, State of Nevada. A true and correct copy of the  
8 Second Deed of Trust is attached hereto as exhibit E and incorporated herein by reference.

9        The obligation under the Second Note is in default as of December 15, 2008, for failure to  
10 make payments to Movant. As of April 9, 2009, the total obligation due and owing under the  
11 Second Note is in the approximate amount of \$10,339.30, representing the principal balance of  
12 \$9,935.67, interest in the sum of \$278.63, late charges in the amount of \$60.00, and total fees in the  
13 amount of \$65.00. This is an approximate amount for purposes of this Motion only, and should not  
14 be relied upon as such to pay off the subject loan as interest and additional advances may come due  
15 subsequent to the filing of the Motion. An exact payoff amount can be obtained by contacting  
16 Movant's counsel. Further, Movant has incurred additional post-petition attorneys' fees and costs in  
17 bringing the instant Motion. Moreover, the total arrears under the Second Note are in the  
18 approximate sum of \$324.37, excluding the post-petition attorneys' fees and costs incurred in filing  
19 the instant Motion. Movant's Information Sheet as to the extent of liens and encumbrances against  
20 the Real Property is attached hereto as exhibit A and incorporated herein by reference.

II.

## RELIEF FROM STAY

## **LACK OF EQUITY**

24 Movant is informed and believes that, based on the Debtor's bankruptcy Schedules and  
25 Statements, the fair market value of the Property is approximately \$126,000.00. True and correct  
26 copies of the Debtor's bankruptcy Schedules "A" and "D" are collectively attached hereto as  
27 exhibit F and incorporated herein by reference.

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Based on the above, Movant maintains that the equity in the Property is as follows:

Fair Market Value:	\$126,000.00
Less:	
Movant's 1 <sup>st</sup> Trust Deed	\$156,849.90
Movant's 2 <sup>nd</sup> Trust Deed	\$10,339.30
Costs of Sale (8%)	<u>\$10,080.00</u>
Equity in the Property:	\$<51,268.90>

As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to relief from the automatic stay pursuant to 11 United States Code § 362(d)(2).

9 Debtor's Statement of Intent indicates it is the intent of the Debtor to surrender the Real  
10 Property in full satisfaction of Movant's secured claim. A true and correct copy of the Debtor's  
11 Statement of Intent is attached hereto as exhibit G and incorporated herein by reference.

III.

**MOVANT IS ENTITLED TO RELIEF FROM THE  
AUTOMATIC STAY UNDER 11 UNITED STATES CODE  
§ 362(d)(1).**

## **CAUSE - LACK OF ADEQUATE PROTECTION**

16 Pursuant to the provisions of 11 United States Code §§ 361 and 362(d)(1), Movant is entitled  
17 to adequate protection of its interest in the Property.

18 Movant submits that adequate protection in this case requires normal and periodic cash  
19 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to  
20 Movant, including all attorneys' fees and costs incurred in the filing of this motion.

Movant is informed and believes that Debtor is presently unwilling or unable to provide adequate protection to the Movant and there is no probability that adequate protection can be afforded to Movant within a reasonable time.

24 By reason of the foregoing, Movant is entitled to relief from stay under 11 United States  
25 Code § 362(d)(1), based upon the failure of Debtor to provide adequate protection to Movant.

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1 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

2 1. Terminating the automatic stay of 11 United States Code § 362, as it applies to the  
3 enforcement by Movant of all of its rights in the Real Property under the Note and the Second Deed  
4 of Trust;

5 2. That the 10-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

6 3. Granting Movant leave to foreclose on the Real Property and to enforce the security  
7 interest under the Note and the Second Deed of Trust, including any action necessary to obtain  
8 possession of the Property;

9 4. Permitting Movant to offer and provide Debtor with information re: a potential  
10 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss  
11 Mitigation Agreement, and to enter into such agreement with Debtor;

12 5. Alternatively, in the event this court declines to grant Movant the relief requested  
13 above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to  
14 reinstate and maintain in a current condition all obligations due under the Note and Second Deed of  
15 Trust and all other deeds of trust encumbering the Real Property, including Debtor's obligations to  
16 pay when due (a) the monthly installments of principal and interest, as required under the Note;  
17 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor in order to  
18 protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred in the  
19 filing of this motion;

20 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be  
21 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law;

22 7. That the requirements of Local Rule 9021 be waived; and

23 8. For such other and further relief as the court deems just and proper.

25 Dated: April 23, 2009

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